BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN THE MATTER OF	)	
	)	
RATES FOR INTERSTATE INMATE CALLING SERVICES	)	**WC DOCKET NO. 12-375**
	)	

REPLY COMMENTS OF MICHAEL S. HAMDEN

In this proceeding to address abusive practices in the ICS industry and the unfettered exploitation of prisoners and their families, a broad range of comments have been filed which address the concerns and voice the views of consumers, correctional professionals, regulators, and representatives of government and the industry. These comments reveal a clear need for comprehensive regulation and an immediate need for FCC action.

ALL COMMENTERS AGREE: ICS SERVE IMPORTANT SOCIETAL INTERESTS

Among the comments that have been filed in this proceeding, there has been universal agreement that prisoner access to telephone services promotes rehabilitation and reduces recidivism. This observation is supported by personal accounts, academic research, governmental reviews, and the findings of blue-ribbon commissions.[1]

Moreover, the availability of telephones in a correctional setting promotes institutional order and security because compliance with prison rules of conduct is a condition precedent to that access. Thus, prisoners who can afford to use the telephone have a strong incentive to comport their behavior with institutional norms in order to establish or maintain contact with those outside of prison.

---

[1] *See, e.g.*, John J. Gibbons and Nicholas deBelleville Katzenbach, *Confronting Confinement: A Report of The Commission on Safety and Abuse in America's Prisons*, 22 Wash. U. J. L. & Policy 385, 438 – 439 (2006), *available at* http://digitalcommons.law.wustl.edu/wujlp/vol22/iss1/25.

Correctional authorities have observed that reasonable rates on prisoner telephone services will make it possible for more regular contact between people who are incarcerated and their loved ones, will promote rehabilitation, and will reduce the associated, substantial societal costs of recidivism.[2] But the unjustifiably high cost of prison telephone calls imposes undue economic burdens which create barriers to communication, constrain communication between prisoners and the outside world, and adversely affect the correctional objectives of rehabilitation and the reduction of recidivism. The counter-productive practices of ICS providers also propel consumer efforts to circumvent exploitation which, in significant part, account for the proliferation of contraband cell phones.[3] Thus, current ICS practices undermine institutional security and order.

It should also be noted that, as prison authorities invest substantial resources in monitoring prisoner calls and investigating leads they uncover in the process, it follows that reasonably accessible prison phones also aid in efforts to circumvent criminal activity.[4]

BROAD AGREEMENT AMONG COMMENTERS:
INTRICACIES HAVE DEVELOPED IN ICS PRACTICES THAT REQUIRE A HOLISTIC APPROACH TO REGULATION

From the perspective of an ICS customer, the cost of a call to a correctional facility is unreasonably expensive because of exploitative "commissions," unconscionably high calling rates and per-call charges, and unjustifiable surcharges (including various fees to establish, maintain, and to close pre-paid accounts). These mechanisms for the collection of excessive fees

[2] *See, e.g.*, American Correctional Association, Public Correctional Policies, Public Correctional Policy on Adult/Juvenile Offender Access to Telephones 2001-1 (amended 2012), *available at* https://www.aca.org/government/policyresolution/PDFs/Public_Correctional_Policies.pdf.

[3] *See, e.g.*, Comments of California Department of Corrections and Rehabilitation at p. 1 ("The possession of unauthorized cell phones in California prisons is a major security and public safety concern.")

[4] *See, e.g.*, Comments of the National Sheriffs' Association at p. 2 (ICS "facilitates law enforcement's ability to monitor and track inmate calling for victim protection, investigative resources, and other public safety purposes.") *See also, e.g.*, Comments of Pay Tel Communications, Inc., at pp. 7 – 9 (security implications of "rate shopping").

work individually and in combination to unjustly enrich ICS providers and their contracting partners.[5]

Over the past decade, faith in *laissez-faire* market forces has created this chimera. Unrestrained market forces cannot now be trusted to slay the beast; nor will half-measures tame the monster. Regulatory measures which address some, but not all of these abusive practices will simply shift the modality of consumer exploitation. Instead, as many commenters have discerned, the remedy depends entirely upon a holistic, comprehensive regulatory approach which addresses each of these components.[6]

PROHIBIT "COMMISSIONS"

Among those commenters who addressed the subject, there is agreement that, because ICS providers have the exclusive contractual right to provide monopoly services, consumers may not choose among alternative telephone services.[7] And while some ICS providers contend that the market is highly competitive, none contend that consumer interests are represented in negotiations to contract for prison telephone services. Rather, as the commenters make clear, exclusive contracts are awarded among competitors (all of which commit to satisfy security and

[5] *See, e.g.*, Comments of Human Rights Defense Center at p. 8 ("credit card charges, inactivity fees and closure fees for prepaid phone accounts . . . effectively raise the overall costs of ICS calls.") Accord, Comments of Pay Tel Communications, Inc., at p. 15 ("The net effect of high payment processing fees and multiple account charges can be to reduce by 50% or more the budget available to each family to pay for actual phone calls. The net result is that the *real* cost of calls is often doubled for the family.").

[6] *See, e.g.*, Comments of CenturyLink at p. 4 ("The best way to achieve a fair and equitable resolution of the ICS issue is to adopt a holistic rate structure that addresses both intrastate and interstate ICS and balances the needs of all stakeholders") and Comments of Pay Tel Communications, Inc., at pp. 3 – 4 ("[A]ny reform of ICS requires a holistic approach . . .") *See also, e.g.*, Comments of Wright Petitioners at p. 39 (advocating "a benchmark ICS rate of $0.07 per minute, with no separate set-up or per-call charge, and eliminate the usurious ancillary charges and practices such as "re-loading" and penalties to receive a refund"); and Comments of Human Rights Defense Center at p. 8 (if the FCC should fail to regulate the market in its entirety, "ICS providers could circumvent Commission-imposed caps on per-call and per-minute charges by simply increasing the extra fees or adding new account related fees that effectively raise the overall costs of ICS calls.").

[7] *See, e.g.*, Comments of Verizon at p. 2.

technical requirements) almost entirely on the basis of how large a "commission" the ICS provider promises.[8] The FCC has characterized these kickbacks as "location rents" that represent profit.[9] These "commissions" are derived from revenue over and above costs and a reasonable return on investment, and there is no dispute that these "commissions" are collected from consumers of the phone services. But some industry representatives stridently and persistently dispute the obvious conclusion that ***charges in excess of fair compensation (costs and a reasonable return on investment) cannot be "fair and reasonable.***"[10]

While correctional professionals acknowledge that ICS should be available at fair and reasonable costs,[11] they point out that some of the revenue generated from "commissions" is used to provide services to prisoners which otherwise would have to be borne by taxpayers.[12] So, in the ICS market, "commissions" function as a hidden tax on the families of prisoners to pay expenses that should instead be borne by the general public as an expense of the justice system. And these "commissions" compromise the integrity of corrections professionals by allowing, requiring, or motivating them to exploit those in their custody.

For all these reasons, "commissions" should be disallowed as a matter of public policy.

---

[8] *Id.*

[9] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1966, THIRD REPORT AND ORDER, AND ORDER ON RECONSIDERATION OF THE SECOND REPORT AND ORDER,* 14 FCC Rcd.2545, 2562 *(J999), pet. Den. Sub nom American Public Comm. Council v. FCC,* 215 F.3d 51 (D.C. Cir. 2000)*("Third Report and Order").*

[10] *But cf., e.g.*, Comments of Verizon at p.2 (Commission action to regulate site commissions "may be appropriate . . . because the market for ICS does not function like most markets").

[11] *See, e.g.*, Comments of the National Sheriffs' Association at p. 1 ("NSA certainly supports any FCC rulemaking 'to ensure just and reasonable ICS rates for interstate, long distance calling at publicly- and privately-administered correctional facilities.'")

[12] *Id*. at p. 2 ("NSA strongly opposes any FCC rulemaking that would . . . put additional burdens on taxpayers . . .")

ESTABLISH BENCHMARK RATES FOR BOTH INTERSTATE AND INTRASTATE ICS

The wide disparity in per-minute calling rates has been broadly acknowledged, but no rationale has been advanced that explains the differences. One expert opines that technological changes have substantially reduced the cost of providing ICS service and minimized or eliminated disparate costs in the provision of ICS to different facilities, irrespective of size,[13] or the actual cost of the call.[14] A review of these rates reveals no rational cost-based reason for the breadth of disparity. However, as one industry expert has observed: "Generally it seems like prison telephone providers will charge as much for calls as they can get away with in each jurisdiction."[15]

ICS providers have declined the Commission's invitation to provide meaningful cost data,[16] and no valid justification for the high rates, the exorbitant surcharges, or the broad discrepancies can be discerned. Of course, the profit motive offers an obvious (and likely, the only rational) explanation.

But in any case, if the Commission establishes a "just and reasonable" benchmark rate for both intrastate and interstate calls that allows ICS providers to seek adjustments from state utilities regulatory agencies upon a showing of abnormally high service costs at a particular

---

[13] *Affidavit of Douglas A. Dawson*, Exhibit 2 at pp. 9 - 11, ¶¶ 21 – 26, Comments of Elizabeth Matos on behalf of Prisoners Legal Services of Massachusetts (posted 26 March 2013)(hereafter, Comments of PLS-MA).

[14] *Id*. at p. 5, ¶ 10.

[15] *Id.*, *Affidavit of Douglas A. Dawson*, Exhibit 2, p. 6, ¶ 16. Mr. Dawson previously supported the Wright Petitioners' proposed benchmark rates of $0.20 per minute for debit calls and $0.25 per minute for collect calls. However, he points out that technological changes since 2007 have reduced the cost of providing service, and he estimates that per-minute costs have fallen precipitously, supporting a far lower rate. *Id*. at pp. 9 – 11, ¶¶ 21 – 24.

[16] *See Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, FCC 12-167, 27 FCC Rcd 16,629 (rel. Dec. 28, 2012), 78 Fed. Reg. 4369 (Jan. 22, 2013).

locale, any legitimate dispute about possible justifications for cost disparities becomes academic.[17]

LEGAL AUTHORITY

Notwithstanding veiled and sometimes vague threats that protracted litigation will be brought by moneyed interests upon the adoption of *any* regulatory action,[18] the FCC has broad and well-recognized authority to regulate all ICS rates and practices.[19]

The courts routinely defer to the FCC under the "primary jurisdiction" doctrine[20] and the "filed rate" doctrine."[21]

---

[17] Such a procedure seems to have support from at least one major ICS provider. "[T]he Commission should consider adopting a mechanism, such as a rate variance procedure, that would provide some flexibility for calling rates where the cost structure and usage statistics of a facility are particularly onerous." Stephanie A. Joyce, Esq., representing Securus Technologies, Inc., Letter Notice of *Ex Parte* Meeting in Docket No. 12-375 at p. 1, ¶ 4 (14 March 2013), available at http://apps.fcc.gov/ecfs/document/view?id=7022121580 (last accessed 17 April 2013).

[18] *See, e.g.*, Comments of Securus Technologies, Inc., at p. 13, *et seq.* (arguing that since correctional professionals are vested with authority to operate their facilities, the FCC lacks jurisdiction over ICS or underlying ICS contracts). *See also*, Comments of Global Tel*Link Corp., at p. 33 ("Courts have routinely ruled that the regulation of state and local corrections facilities must be left to the local authorities"), and at p. 35 ("ICS rates are inextricably bound up with the payment of commissions, which are also established and administered by local policymakers").

[19] *Accord*, Reply Comments of National Association of State Utility Consumer advocates at p. 2 ("[N]one of the commenters seriously challenge the Commission's jurisdiction to regulate rates for ICS services"); and Comments of Pay Tel Communications, Inc., at p. 5 ("Any consideration of interstate rates must necessarily include consideration of intrastate rates, as well as consideration of the rest of the entire ICS system").

See also, Comments of Global Tel*Link Corp., at p. 32 ("Section 276(b)(1)(A) requires the FCC to 'establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call.'"); and at p. 33 ("Sections 201 and 276 appear to provide broad authority for the FCC to address interstate interexchange ICS rates . .. FCC intervention in issues subject to state regulation- including intrastate ICS rates- would be appropriate [where there is] no other way for the FCC to carry out its mandates under the Act.").

Cf., Comments of Securus Technologies, Inc., at p. 9 ("[T]he choice to impose site commissions on inmate telephone systems is also within the agency's discretion." [Conversely, it follows that the FCC can exercise that choice to *prohibit* site commissions.]); at p. 14 ("According to the Commission, rate regulation should be imposed if a demonstrable market failure has occurred."); and at Section III, pp. 15 – 19, implicitly acknowledging the authority of the FCC to adopt rate caps, while arguing against regulatory action.

And see, Comments of National Association of State Utility Consumer Advocates at p. 7 ([S]ection [276] gives the Commission plenary authority over ICS calling, both interstate and intrastate." (footnote omitted); and at p. ii ("[T]he FCC should set conditions for all ICS services."); and Comments of Wright Petitioners at p. 5 ("[T]here is no legitimate question that the Act provides the FCC with sufficient authority to regulate all ICS rates and practices. Section 276 was written specifically to apply to inmate telephone service, and Section 201(b) prohibits unjust and unreasonable rates and practices.")

The FCC has the authority to regulate ICS, even if regulatory action has incidental implications for entities beyond its jurisdiction. *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999). It is firmly established that the FCC has authority to "regulate the contractual or other arrangements between common carriers and other entities, even those entities that are generally not subject to Commission regulation." *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, FCC 08-87, ¶ 15 & n.48 (Mar. 21, 2008). It is, by now, axiomatic that the scope of the Commission's authority should be broadly construed.[22]

As these and other cases demonstrate, the courts will uphold agency action that comports with statutory obligations to protect the public.[23]

And although ICS providers bravely argue that the factual predicate may not be present here, even they concede that the FCC may regulate the industry where there is a "market failure,"[24] or where necessary for the FCC to meet its statutory obligations to ensure fair compensation at "just and reasonable rates."[25]

---

[20] *See, e.g., Wright v. Corrections Corp. of America*, C.A. No. 00-293 (GK), Memorandum Opinion, slip op. at 8 (D.D.C. Aug. 22, 2001)("Congress has given the FCC explicit statutory authority to regulate inmate payphone services in particular.")(*citing* 47 U.S.C. § 276(d)).

[21] *See, e.g., Guglielmo v. Worldcom, Inc.*, 148 N.H. 309, 808 A.2d 65 (N.H. 2002).

[22] *See*, 47 U.S.C. § 151. S*ee also, e.g.,* 47 U.S.C. § 154(i)(Commission authorized to issue such orders, promulgate such regulations, and take such actions as necessary to effectuate purposes of Act). *Accord*, 47 U.S.C. § 303(r); 47 U.S.C. § 201(b)(regulation in public interest).

[23] A recent example of the deference courts accord federal agencies acting in the public interest is *Spirit Airlines v. Department of Transportation*, 687 F.3d 403 (D.C. Cir. 2012), http://www.cadc.uscourts.gov/internet/opinions.nsf/B3C8FBE2AB1F6A9185257A45004EE709/$file/11-1219-1385164.pdf, *cert. denied*, U.S. Supreme Court, No. 12-656, http://www.supremecourt.gov/orders/courtorders/040113zor_bq7d.pdf (1 April 2013). There, in an effort to regulate "unfair and deceptive" practices in the airline industry, the Department of Transportation issued regulations requiring all costs associated with the price of an airline ticket, including taxes and fees, to be listed in advertised rates. The court rejected arguments that the rule was "arbitrary and capricious," that it was contrary to the law that deregulated the industry, and that the regulation violated free speech rights. The DOT regulation was upheld as a valid exercise of its authority.

But while the courts blithely refer pressing disputes to the Commission (and perhaps fervently hope for the timely resolution of ICS disputes), all interested parties await FCC action. Meanwhile, prisoners and their families are oppressed by the crushing weight of exorbitant rates and fees; governmental authorities greedily demand ever higher "commissions;" and ICS providers, unable to forecast the future regulatory landscape, hedge the uncertainty with windfall profits and seemingly limitless pretenses to pad their bottom lines with ever more imaginative surcharges.

THE ICS MARKET HAS FAILED TO ENGENDER CONSUMER-ORIENTED COMPETITION AND THERE IS NO ALTERNATIVE TO COMPREHENSIVE REGULATION TO ESTABLISH EQUILIBRIUM

There simply is no dispute that the *only* competition that exists within the ICS industry pits providers against each other to offer the largest possible commission to governmental authorities operating correctional facilities or systems.[26] That kind of competition forecloses consumer choice as to quality of service or costs.[27] Instead, it works to the manifest detriment of consumers, driving their costs relentlessly higher to subsidize increasing "commission" percentages and to further increase ICS profits through payments for a broad and expanding array of surcharges.

---

[24] Comments of Securus Technologies, Inc., at p. 14: "The Commission may intercede in service rates only where a market failure is demonstrated."

[25] Comments of Global Tel*Link Corp., at 33 "FCC intervention in issues subject to state regulation- including intrastate ICS rates- would be appropriate only if there were no other way for the FCC to carry out its mandates under the Act."

[26] *See, e.g.*, Comments of Verizon at p. 2 ("[T]he competition for the contract tends to revolve around the commission percentage that the bidder is willing to pay the DOC."

[27] *Id.* ("And since the contracts are exclusive contracts, the inmates' call recipients – usually the inmates' families who often are economically disadvantaged – have no choice but to fund the large commissions. This mismatch between the entity that selects the ICS provider and those who use and pay for the provider's calling services can result in distortions.")

Vested interests insist that the market is far too varied and complex for a "one-size-fits-all" regulatory approach. They say that regulation would be a usurpation of the authority entrusted to governmental authorities to operate correctional facilities and an unjustified intrusion into the province of state and local government agencies and officials to regulate the ICS industry within their jurisdictions.[28] Instead, they argue, the only workable approach is the one they have advocated for the last 20 years – allow market forces to operate, unfettered by burdensome, unwieldy regulation. But the evidence is now incontrovertible that such an approach leads to the dysfunctional ICS market that prevails today, unjustly rewarding monopolistic practices that operate in disregard of consumer interests and, indeed, enabling the unbridled exploitation of those consumers.

Only comprehensive regulation can end the perverse practices that have developed in the ICS market. The elimination of "commissions" will merely result in demands for set-offs and a shift of profit-sharing mechanisms such that governmental authorities will claim reimbursement for hyper-attenuated costs of operating ICS. The establishment of a benchmark rate, with no other regulation, will motivate ICS providers to shift costs to increased (and as yet unimagined) surcharges. The elimination of surcharges by itself will result in increased per minute rates and higher commissions. In short, nothing less than comprehensive regulation can accomplish the kind of thorough and complete reform that the ICS industry needs and consumers demand.

CONCLUSION

The FCC can establish "just and reasonable rates" which provide "fair compensation" in no way other than by regulating the industry to address each of these problematic components. The Federal Communication Commission should immediately act to:

[28] *But see*, Reply Comments of National Association of State Utility Consumer advocates at p. 4 ("The FCC's lawful assertion of its jurisdiction no more 'interferes' with inmate facility operations than does state or federal regulation of the other utility rates (telephone or energy) paid by such institutions."

(1) Establish a single fair rate for all intrastate and interstate prisoner phone calls while allowing legitimate costs and fair compensation at just and reasonable rates, irrespective of the origination of the call.

(2) Foreclose all opportunities to circumvent the established fair rate by prohibiting "commissions," surcharges, and additional fees imposed by prison phone service providers or their subsidiaries by ensuring that third party payment fees are passed through to families at cost with no mark-up or profit for ICS providers.

(3) Require calling options, including pre-paid, debit, and collect calls consistent with sound correctional practices and security concerns; and

(4) Leave it to state utilities commissions to address any purported need for cost increases associated with the provision of services upon a showing of unreasonably high service costs at a particular locale.[29]

Respectfully submitted this 22nd day of April, 2013.

Michael S. Hamden
NC State Bar #12752
1612 Homestead Road
Chapel Hill, NC 27516
(919) 605 – 2622
M2007Hamden@cs.com

[29] An evident insensitivity to the devastating impact that ICS practices have on prisoners and their families, coupled with a compelling financial incentive for ICS providers and government officials to perpetuate the *status quo* seem clearly to reveal the necessity of a "fresh look" if regulatory reform is to achieve its objectives. *Accord*, Comments of TelMate at p. 17 ("If a new regulatory structure were only to apply after expiration of existing contracts, rate reform would be delayed considerably.")

The only legitimate question in this regard is what period of time affords contracting parties a reasonable opportunity to revisit terms and services. That is especially important as the term of some contracts reportedly extends 10 years into the future. Comments of Global Tel*Link at p. 29. Many advocate a short, six-month "fresh look" period, while some (including at least one ICS provider) favor a one-year period. *See, e.g.*, Comments of TurnKey Corrections at p. 5. Indeed, twelve months should provide adequate time for responsible ICS providers and correctional authorities to review and revise contract terms, and to plan to come into compliance with regulatory changes that have been long needed and should have been anticipated to rectify the very industry abuses which they crafted.